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IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

DEENA DEARDURFF SCHMIDT, Plaintiff, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN DIEGO STATE UNIVERSITY, JEFF SCHEMMEL, DOES 1-15, Defendants.	CASE NO. 07-CV-2343DMS(WMC) **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT** Date: June 20, 2008 Time: 1:30 p.m. Courtroom: 10

1. Introduction

This motions seeks the Court's order for leave to file the attached proposed First Amended Complaint.

The original complaint was filed in the San Diego Superior Court on November 7, 2007. That complaint alleges that Defendants the Board of Trustees of the California State University and San Diego State University (SDSU) unlawfully discriminated and retaliated against Deena Deardurff Schmidt, the coach of SDSU's women's swimming and diving teams, in violation of Title 9, 20 U.S.C. §1681 et seq., and California's Fair Employment and Housing Act (FEHA), Govt. Code §12940 et seq. The complaint also alleges that SDSU's Athletic Director, Defendant Jeff Schemmel, unlawfully retaliated against Ms. Schmidt in violation of FEHA.

Defendants removed the case to federal court and filed an answer. Magistrate Judge William McCurine has conducted an early neutral evaluation. Initial disclosures have been made but formal discovery will not commence until May 23, 2008.

In addition to numbering changes, the proposed First Amended Complaint changes the complaint in two respects. First, Jeff Schemmel is dropped as a defendant, because of a change in California law which occurred after the complaint was filed. Second, the second cause of action for sex discrimination under Title 9 is clarified and amplified. The factual allegations remain the same.

Under the liberal standard for allowing amendment to pleadings, no good reason exists to deny leave to amend and the amended complaint must be ordered filed.

2. Leave To File The First Amended Complaint Must Be Granted

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Rule 15's policy of favoring amendments to pleadings should be applied with "extreme liberality." DCD Programs, Ltd., v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) Amendment of a pleading must be granted in the absence of bad faith, undue delay, prejudice to the opposing party, and futility of amendment. Foman v. Davis, 371 U.S. 178, 182 (1962); DCD Programs, Ltd., v. Leighton, supra at 186.

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A. No Bad Faith

The proposed amended complaint is not brought in bad faith, and there is no evidence of bad faith. The First Amended Complaint demonstrates Plaintiff's good faith because it results in the dropping of Jeff Schemmel as a defendant. On March 3, 2008, the California Supreme Court decided *Jones v. The Lodge at Torrey Pines* (2008) 42 Cal.4th 1158, which held that an individual cannot be a defendant in a FEHA retaliation claim except possibly in circumstances not applicable to this case. Accordingly, and in good faith, Plaintiff reluctantly drops Jeff Schemmel as a defendant. The dropping of a defendant is a valid purpose for amendment of a complaint. See Samaha v. Presbyterian Hospital, 757 F.2d 529, 531 (2d Cir. 1985)

B. No Undue Delay

This motion to amend is filed within the time set by the Magistrate Judge filing motions to amend pleadings.

C. No Prejudice To Defendants

Filing of the First Amended Complaint will not prejudice Defendants. A new party is not added and discovery has only just begun.

D. Not Futile

Nor is the proposed amendment futile. Leave to amend must be granted even if an amendment does not state a claim unless it appears beyond doubt that the amendment would be dismissed because Plaintiff could prove no set of facts which would entitle her to relief. DCD Programs, Ltd., v. Leighton, supra at 188.

The only substantive amendment of the complaint is Plaintiff's clarification and amplification of her second claim

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for relief for sex discrimination under Title 9, 20 U.S.C. §1681(a). The complaint alleges that Defendants denied Plaintiff pay, limited the duration of her contract, imposed unrealistic expectations, did not renew her contract and terminated her "because of her sex, in violation of 20 U.S.C. §1681(a)." (Complaint p.8 lines 21-24 ¶40) The First Amended Complaint alleges that Defendants undertook these same adverse employment actions "because of her sex and/or because of intentional discrimination against her as a result of sex discrimination against the female student athletes whom she coached, in violation of 20 U.S.C. §1681(a)." (First Amended Complaint p.11 lines 19-21 ¶39.)

Title 9 provides in relevant part that "no person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.§1681(a) The scope of Title 9 is drawn from its text, which broadly prohibits a funding recipient from subjecting any person to intentional "discrimination" "on the basis of sex." 20 U.S.C. 1681(a); Jackson v. Birmingham Board of Education, 544 U.S. 167, 173 (2005). A victim of prohibited Title 9 discrimination need not be discriminated against on the basis of his or her own sex. Id. at 179. In Jackson, the Supreme Court held that termination of a teacher's coaching duties in retaliation for his protests about discrimination against a girl's athletic team violated Title 9; retaliation is an intentional act which subjected the teacher to differential treatment "on the basis of sex," i.e. in response to the nature

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of the protests against sex discrimination against the girls' team. Id. at 173-4. In like vein, subjecting Schmidt to "intentional discrimination against her as a result of sex discrimination against the female student athletes whom she coached" alleges "discrimination" "on the basis of sex" in violation of Title 9.

The proposed amendment to the second claim for relief is not futile.

3. Conclusion

The letter and spirit of Rule 15(a) require the granting of leave to file the proposed First Amended Complaint. No good reason exists to deny leave to amend.

Dated: May 19, 2008

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